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POLICE OFFICER'S HANDBOOK

THE CRIMINAL LAW

PART I

HOUSEBREAKING

ENTERING WITHOUT BREAKING

CONCEALMENT

ATTEMPT TO COMMIT FELONY

FLEMING'S NOTEBOOK...Chapter 101

The State Supreme Court's Rule Promulgated under the Defense of Indigents Act (Warning Officer Rule)

Prepared under the direction of E. Fleming Mason Producer of Crime-to-Court ETV Law Enforcement Informational Programs, in cooperation with South Carolina Educational Television Network with funds provided through the South Carolina Criminal Justice Academy.

LAW ENFORCEMENT - ETV TRAINING PROGRAM

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FOREWORD

"Burglary is a common law crime, and is an offense against the living quarters of the residents...which may be committed only at night; whereas, housebreaking is a statutory crime and is an offense against right to possession, and it may be committed against any building at any time of night or day."

Hon. John T. Gentry
County Judge
Pickens County
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HOUSEBREAKING

Section 16-332, 1962 Code of Laws of South Carolina:

§16-332. HOUSEBREAKING WHICH IS NOT BURGLARY. Every person who shall break and enter or who shall break with intent to enter, in the daytime, any dwelling house or other house or who shall break and enter or shall break with intent to enter, in the nighttime, any house the breaking and entering of which would not constitute burglary, with intent to commit a felony or other crime of a lesser grade, shall be held guilty of a felony and punishable at the discretion of the court by imprisonment in the county jail or Penitentiary for a term not exceeding five years.

The purpose of the housebreaking statute was to cover an area of wrongdoings that did not amount to burglary. At the common law, burglary was a crime,

but breaking and entering a storebuilding for the purpose of stealing was not. It is for this reason that 'housebreaking' is known as a statutory crime, whereas 'burglary' is a common law crime. State v. Alford, 142 SC 43, 140 SE 261.

Housebreaking is a crime that violates the right of the owner or other person lawfully in possession of the premises to exclusive possession of such premises. The mere breaking and entering of the premises of another without 'intent to commit a crime' is not housebreaking. State v. Melton, 181 SC 482, 188 SE 133. A jury may find as a fact that 'intent to commit a crime' was present in the mind of one who breaks and enters, even tho no stealing or other crime actually took place. Circumstances may lawfully support a finding of such 'intent'. In other words, circumstantial evidence may establish proof of 'intent to commit a crime'.

In order to constitute the crime of burglary, the breaking and entering must be in a 'dwelling house', whereas in housebreaking the crime may be committed with respect to any building whatsoever. State v. Ginns, 1 N. and McC. 583.

Although there must be a 'breaking' of some kind in order to constitute the crime of housebreaking, a very slight breaking is sufficient. If, for example, a closed but unlatched screen door is opened by the felon in order to gain entrance, such act is enough to constitute a 'breaking'. State v. Clamp, 225 SC 89.

There need be no other crime actually committed to make out the crime of housebreaking. It is the 'intent' to steal or commit some other crime in the building that is essential. State v. Christensen, 194 SC 131, 9 SE 2d 555.

When another crime...such a larceny...is actually committed, however, it is a separate and distinct offense and may be charged as an additional count in the arrest warrant and the indictment. Copeland v. Manning, 234 SC 510, 109 SE 2d 361.

The crime of housebreaking may be committed at anytime of the day or night. Section 16-332, 1962 Code of Laws.

Although housebreaking and burglary are serious crimes, the setting of a 'spring gun' to prevent entry is not lawful. State v. Green, 118 SC 279, 110 SE 145.

CHECKLIST FOR HOUSEBREAKING

1. Breaking.
2. Entering.
3. Of any building of another.
4. With intent to commit a crime.

EXAMPLE AFFIDAVIT

"...that one John Roe did in this County on the 1st day of January, 1974, break and enter the warehouse of one Richard Doe, located at 103 Roebuck Road, near Alaskaville, with intent to commit a crime therein."

WHEN LARCENY COMMITTED

(Second Count)

"...that one John Roe did in this County on the 1st day of January, 1974, steal, i.e., take and carry away with intent to deprive the owner permanently thereof, certain goods of one Richard Doe of the value of more than fifty dollars, such goods being described: locks and keys, chisels, ammunition, and other items of hardware."

ENTERING WITHOUT BREAKING AND CONCEALMENT

Section 16-361, 1962 Code of Laws of South Carolina:

§16-361. ENTERING HOUSE OR VESSEL WITHOUT BREAKING WITH INTENT TO STEAL; ATTEMPT TO ENTER. Any person who shall enter, without breaking, or attempt to enter any house or vessel whatsoever, with intent to steal or commit any other crime or shall conceal himself in any house or vessel, with like intent, shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished in the discretion of the court.

'House' is not confined to living quarters. It includes any building of any kind whatsoever used to house anything or designed to house anything. The term 'house' is broad enough to include an office. State v. Ross, 83 SC 434.

CHECKLIST

1. Entering or attempting to enter.
2. Any house or vessel whatsoever.
3. With intent to steal or commit some other crime.

EXAMPLE AFFIDAVITS

"...that one John Doe did enter the warehouse of one Richard Roe in this County on the 1st day of January, 1974, with intent to commit a crime therein."

"...that one John Doe did conceal himself in the store of one Richard Roe located at 1000 Commerce Street in the City of Plainville in this County on the 1st day of January, 1974, with intent to commit a crime therein."

ATTEMPT TO COMMIT FELONY

It is a crime in South Carolina for a person to attempt to commit a felony, even tho the crime is never accomplished. This is under the common law and, although, just as effective as any other law, will not be found in the South Carolina Code of Laws. State v. Maner 20 SC L 453.

An attempt to commit a misdemeanor is not a crime. Hill v. State, 53 Ga. 125.

NOTES FROM WHARTON'S

CRIMINAL LAW AND PROCEDURE

DEFINITION

An attempt is an act done with the intent of committing a crime, but which fails of completion. To constitute an attempt, the defendant must, (1) with the intent to commit a specific crime, (2) do an overt act directed to its commission, which goes beyond mere preparation and is apparently suitable for that purpose, but (3) which fails to result in the commission of the intended crime.

An attempt is sometimes defined as any overt act done with the intent to commit a crime, which, except for the interference of some cause preventing the carrying out of the intent, would have resulted in the commission of the crime. In some states it is declared by statute that a person is guilty of an attempt if he attempts to commit any crime, but fails,

to accomplish it, or fails or is prevented or intercepted in the perpetration of the offense.

It is also said that an attempt is an intended apparent unfinished crime. This is a satisfactory statement if it is regarded as meaning only that there must be the intent to commit the ultimate uncompleted crime, that there must be an act advancing the carrying of the intent into execution, and that the effort of the defendant failed to achieve the intended criminal result.

In some states attempts are defined by statute only with reference to particular crimes.

CLASSIFICATION OF OFFENSE

By the common law it is a misdemeanor to attempt to commit either a felony, or a malicious misdemeanor, whether common-law or statutory. Thus, it is a common-law offense to attempt to commit arson, burglary,

subornation of perjury, or to obtain money by false pretenses.

Some courts hold that there can be no attempt to commit a misdemeanor which is merely malum prohibitum.

As an exception to the general rule that there may be an attempt to commit any crime, it is held that there can be no attempt to commit a crime which in itself is merely an attempt, that is, that there can be no attempt to commit an attempt. Thus, since embracery is an attempt to bribe a jury, there cannot be an attempt to commit embracery. As an assault is an attempt to commit a battery, there can be no attempt to commit an assault.

As a second exception, there can be no attempt to commit a crime the gravamen of which is negligence. By definition, the attempt must be committed with the intent to commit the crime, and an intentional

negligent act is a contradiction in terms.

To constitute a criminal attempt, it is necessary that the act which is attempted be a crime. In jurisdictions in which suicide is not a crime, it has been held that an attempt at suicide is not criminal. At common law an attempt to commit suicide is indictable.

THE MENTAL STATE

There must be an intent to commit a specific crime to constitute an attempt, even though the commission of the crime itself might not require such a specific intent. Thus, although murder may be committed without a specific intent to kill, as under the felony murder rule, there can be no attempt to commit murder without a specific intent to kill.

THE ACT

To constitute an attempt, there must be an act directed to the commission of an intended crime, which act goes beyond mere preparation and is apparently suited for the intended prupose, although it may be any act in the series of acts which would ordinarily result in the commission of the crime, and need not be the last or final step in the sequence. Whether an act has passed beyond the stage of preparation and constitutes an attempt is a question of degree.

It is commonly stated that the act of the defendant must have come so near the commission of the crime that it would have been consummated but for the intervention of some extraneous force or element. This is not always followed, and the more serious the intended crime the more willing are the courts to find that an act anterior to the last act preceding the commission of the offense is a

sufficient act to constitute an attempt. It is also said that when an intent to commit a specific crime is clearly shown, slight acts in furtherance of that intent will constitute an attempt.

It is also variously stated that an attempt is a direct movement toward the commission of the crime after the preparations have been made; that the defendant's act must be a direct, unequivocal act toward the commission of the intended crime; that his acts must have progressed to the extent of giving him power to commit the offense and nothing but an interruption prevented the commission of the offense; that the defendant's act must reach far enough toward the accomplishment of his intention to commit the offense to amount to a commencement of the consummation or to be a step in the direct movement toward its commission; and that some appreciable fragment of the crime must be committed so that the crime would be completed if the defendant were not interrupted.

An attempt must be more than an intent. Mere words cannot constitute an offense, unless the fact of their utterance is in itself a substantive crime, as in the case of words that are libelous, seditious, obscene, or provocative of a breach of the peace, or that constitute solicitations to commit a crime.

The overt act must be such as will apparently result, in the usual and natural course of events, in the commission of the intended crime if not interrupted in any way.

PREPARATIONS

Preparation to commit a crime is not punishable as an offense or an attempt. Preparation includes those acts which relate to the planning of the crime and the devising or obtaining the means or making arrangements for its execution. The distinction between preparation and an act which is an attempt to commit a crime for which the preparation was made

is not always simple or easy to make, and each case must necessarily be determined by its own circumstances.

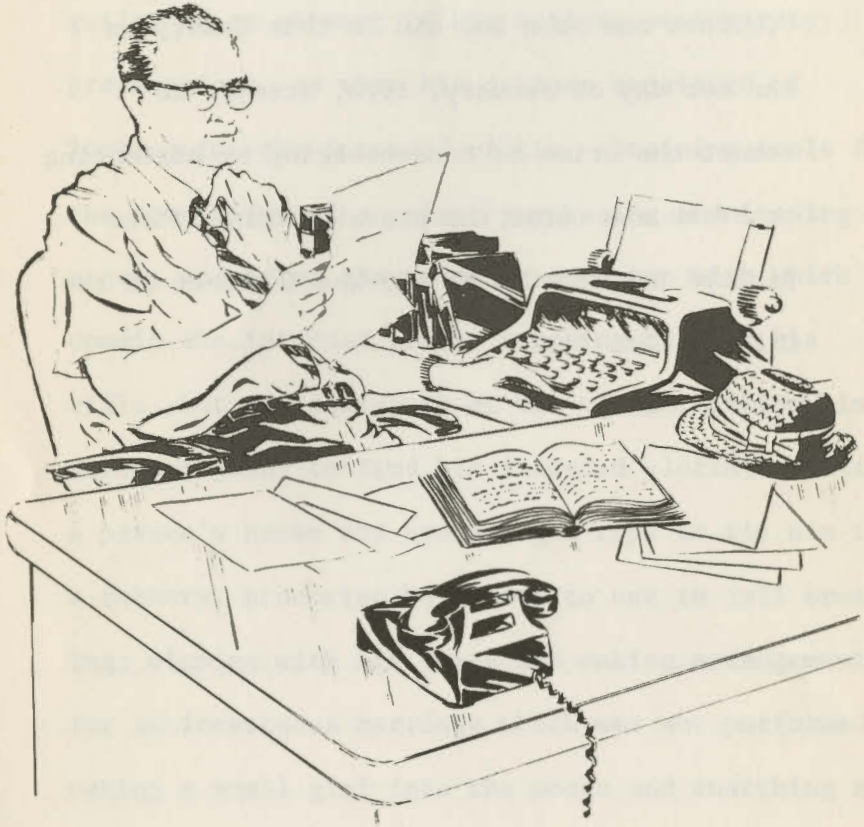
It has been held that the defendant is not guilty of an attempt if his actions were merely preparations, as when his actions consisted of looking for the intended victim; obtaining tools for the commission of a crime; purchasing and loading a gun; acquiring the means or a weapon with which to commit the intended crime; stopping to load his rifle, but not aiming it at the victim; arming himself and going to find his intended victim; watching a person's house and procuring a rope to tie him in a robbery; procuring hack saws to use in jail breaking; eloping with his niece and making arrangements for an incestuous marriage which was not performed; taking a small girl into the woods and snatching a button from her clothing with the intent to have intercourse; inviting a young boy into an automobile to commit indecencies; or making financial and

business arrangements for the performance of an abortion.

EXAMPLE AFFIDAVIT

"...that one John Doe did in this County on the 1st day of January, 1974, attempt to commit the crime of housebreaking by attempting to break and enter the storebuilding of one Richard Roe located at 900 Wharf Street in the City of Carpline."

FLEMING'S NOTEBOOK



FLEMING'S NOTEBOOK...Chapter 101:

One Rule of the Supreme Court, having the full force and effect of law, that is often overlooked or forgotten is Rule I of the South Carolina Supreme Court promulgated under the Defense of Indigents Act:

"Rule 1.

"Every person arrested for the commission of a crime within the jurisdiction of the Court of General Sessions...and every person charged with the violation of a probationary sentence...shall be taken as soon as practicable before the Clerk of Court of General Sessions in the county where the charges are preferred, or such other officer or officers as may be designated by the resident judge of the circuit, for the purpose of securing to the accused the right to counsel."

Although a surface reading of Rule 1. would

indicate that every such defendant must be taken before a 'warning officer', the Supreme Court has explained that the Rule does not apply in all cases. In a case entitled State v. Bishop, 256 SC 158, 181 SE 2d 477, a defendant convicted of grand larceny appealed to the Supreme Court on the ground that his confession was obtained by police before he was taken before a 'warning officer'. The Court denied relief, stating:

> "The Rule relied upon was intended to insure timely appointment of counsel for indigents charged with crime...not to impose a condition upon the right of police officers to interrogate a willing suspect merely because he is in custody and has not been...taken before a designated officer."

While the Bishop case supplies some answers relative to the 'warning officer' rule, it leaves some questions unanswered.

QUESTIONS ANSWERED

It can be gotten from the Bishop case that the 'warning officer' rule (Rule 1.) does not apply when a defendant is represented by counsel, and it follows, reasonably, that it does not apply when the defendant has been released on bond. Thus, any construction of 'Rule 1.' that it requires that every general sessions court defendant in every case be carried before a 'warning officer', is in error. The Court itself says that it had no such purpose in mind. As a practical rule-of-thumb, the Rule, as construed by Bishop, seems to say:

WHAT MAY BE DONE

1. 'Rule 1' does not prevent proper questioning of an indigent defendant before he has been taken before the Clerk of Court, or other 'warning officer'.

2. If a defendant has an attorney or has been released on bond, 'Rule 1' does not apply.

3. 'Rule 1' does not apply except in cases of indigency.

SUGGESTED ACTION

As early as 1940, in a case entitled McNabb v. United States, 87 L ed 819, the United States Supreme Court reversed the conviction of a defendant for the murder of a revenue agent because the defendant had been questioned by arresting officers for several hours before being brought before a Federal

Magistrate "without delay", as was required by Federal rules of court (Rule 5(a)). No question of the voluntariness of McNabb's confession, upon which he was convicted, was involved.

In 1955, in a case entitled Mallory v. United States, 1 L ed 2d 1479, the United States Supreme Court reversed a rape conviction on the same ground as McNabb. Mallory had been questioned by police for several hours before being taken before a Federal magistrate.

Although, admittedly, McNabb and Mallory are cases involving construction of Federal rules of court, and are not at this time strictly applicable to rules of state courts, the question of "due process" is almost imperceptibly interwoven into the cloth of the question. It is strongly recommended that it is reasonable and advisable for police officers to follow these rules when dealing with indigent defendants in serious cases:

FLEMING'S RULE ON INDIGENTS

I. An unrepresented indigent defendant should not be questioned after a warning officer has been readily available...even after proper Miranda warnings...until after he has been warned under Rule 1 of the State Supreme Court (Indigent Act).

II. An unrepresented indigent defendant may be questioned with his consent...after Miranda warnings...until such time as a warning officer is readily available.

NOTE: The editor of the Notebook does not assert the foregoing Rule as being absolutely necessary under the Bishop case, supra, but such Rule is recommended as being the safest course to follow. It is the opinion of this editor that the McNabb-Mallory wind is freshening and will inevitably be applied to state police action through the portal of constitutional due process. 30...EFM

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